

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-191

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 137037

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, John Doe, appeals from the decision by a judge of the Superior Court affirming the decision of a Sex Offender Registry Board (SORB) hearing examiner reclassifying Doe from a level two sex offender to a level three sex offender. He claims that SORB lacked the authority to reclassify him and that the hearing examiner's decision was arbitrary and capricious. We remand to SORB for reconsideration in light of Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643 (2019) (Doe No. 496501).

Background. 1. Initial classification. In 2005, a twenty-three year old female reported to the police that a man, later identified as Doe, knocked on the door to her apartment and forced his way inside. Doe then grabbed the victim from behind, fondled her breasts, and attempted to kiss her on the

mouth several times. Doe lived in the same apartment building as the victim and had made verbal advances toward her the previous evening.

Doe was arrested and pleaded guilty to indecent assault and battery on a person age fourteen or over, and breaking and entering in the daytime with intent to commit a felony. The judge sentenced Doe to two years of supervised probation on each charge, to be served concurrently. As a result of this incident, in 2007, SORB classified Doe as a level two sex offender.

2. Reclassification. In 2012, a thirty-five year old woman reported that as she walked from a store to the park, a man whom she did not know, later identified as Doe, followed her in his car. The woman reported that Doe tried to get her attention by calling out, waving, and beeping his horn. She stated that Doe was "doing sexual things and masturbating while following her" and that "while he was moving his hands on his private parts" he said to her, "[O]h baby can you help me with this."¹ Following a bench trial in the District Court in December 2013, Doe was convicted of one count of lewd, wanton,

¹ Another woman, age thirty-two, reported to the police that she had an earlier encounter with Doe. She reported that while crossing the street with her young son, a man, later identified as Doe, told her, "I would like to be walking with you." When the victim held up her ring finger and told Doe that she was engaged, Doe said, "[G]ive me your number," honked his horn at her a few times, and drove away.

and lascivious conduct and one count of annoying or accosting a person of the opposite sex.² Doe received consecutive six-month sentences to the house of correction.

In 2014, as a result of the new convictions, SORB notified Doe of its recommendation that he be reclassified as a level three sex offender. See G. L. c. 6, § 178L (3); 803 Code Mass. Regs. § 1.32(1), (2) (2016). Doe challenged the reclassification, and the examiner conducted a de novo hearing.³ The examiner determined, by clear and convincing evidence, "that a reclassification of [Doe's] original classification level IS warranted and that [Doe] now presents as a high risk of reoffense and degree of dangerousness such that active dissemination of his personal information is prudent to public safety." Accordingly, she ordered Doe to register as a level three sex offender. Doe sought judicial review of that decision in the Superior Court pursuant to G. L. c. 6, § 178M, and G. L. c. 30A, § 14. A Superior Court judge denied Doe's motion for judgment on the pleadings and affirmed SORB's reclassification of Doe as a level three sex offender. Doe timely appealed.

² These crimes are not enumerated "sex offenses" under the sex offender registry laws. See G. L. c. 6, § 178C.

³ The examiner first conducted a hearing in 2015, but while that decision was pending, the Supreme Judicial Court revised the standard of proof for an offender's risk classification from preponderance to clear and convincing evidence. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 298 (2015). Accordingly, in 2016, the examiner conducted a new hearing pursuant to G. L. c. 6, § 178L.

Discussion. 1. SORB's power to reclassify Doe. Doe contends that because he did not commit a new "sex offense," as defined under G. L. c. 6, § 178C, SORB lacked the authority to reclassify him. General Laws c. 6, § 178L (3),⁴ provides that "[SORB] may, on its own initiative or upon written request by a police department or district attorney, seek to reclassify any registered and finally classified sex offender in the event that new information, which is relevant to a determination of a risk of re-offense or degree of dangerousness, is received." Pursuant to G. L. c. 6, § 178L (3), SORB promulgated 803 Code Mass. Regs. § 1.32, which provides in relevant part that "[r]eclassification may be based on, but is not limited to, information indicating the sex offender" falls into any of eight enumerated categories, including that the offender has "(f) [b]een incarcerated for more than 60 consecutive days at any time following final classification by [SORB]" and "(h) [d]emonstrated a lack of stability in the community." 803 Code Mass. Regs. § 1.32(2)(f), (h) (2016).

⁴ The Legislature amended G. L. c. 6, § 178L, in 2013 after this court held in Doe, Sex Offender Registry Bd. No. 16748 v. Sex Offender Registry Bd., 82 Mass. App. Ct. 152, 161-162 (2012), that the sex offender registry laws then in effect did not provide SORB with the authority to reclassify an offender unless the offender was convicted of "one of the specifically enumerated sex offenses in the statute."

The preferred method to challenge a SORB regulation is to seek declaratory relief in the Superior Court.⁵ Contrast Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 629 (2011), citing G. L. c. 30A, § 7 ("A challenge to the constitutionality of a regulation of general application is appropriately presented as an action for declaratory judgment"); Doe, Sex Offender Registry Bd. No. 203108 v. Sex Offender Registry Bd., 87 Mass. App. Ct. 313, 320-321 (2015) ("Because the plaintiff did not file an action for declaratory relief in the Superior Court, insofar as he argues that these parts of the regulations are invalid, we are without jurisdiction to entertain the arguments"), with Doe, Sex Offender Registry Bd. No. 16748 v. Sex Offender Registry Bd., 82 Mass. App. Ct. 152, 157 (2012) (considering challenge to SORB's authority to adopt regulation at issue "[d]espite the preference for presenting a challenge to a regulation in a declaratory action," because issue faced was "purely one of statutory interpretation, a quintessential judicial responsibility"). See

⁵ By asserting a separate claim for declaratory relief, the offender and SORB are able to fully develop the record and their respective arguments as they relate to the validity of the regulation. Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 630 (2011) ("A challenge to the constitutionality of a general regulation cannot be resolved by requesting declaratory relief in an appeal from an administrative agency decision because judicial review is confined to the administrative record, see G. L. c. 30A, § 14 [5], which has been made based on the presumption that the classification scheme is constitutional").

E.B. Cypher, Criminal Practice and Procedure § 67:10 (4th ed. 2014). In the present case, Doe did not seek declaratory relief in the Superior Court. Accordingly, we need not reach the merits of his argument regarding SORB's authority to reclassify him.⁶

2. Doe's reclassification as a level three sex offender.

Doe next argues that the examiner's decision was arbitrary and capricious because SORB failed to prove by clear and convincing evidence that his 2012 offenses increased the danger he posed to the public to warrant a level three⁷ sex offender classification. On this issue, we remand to SORB for reconsideration in light of the recent decision in Doe No. 496501, 482 Mass. at 643.

When SORB initiates the reclassification process pursuant to 803 Code Mass. Regs. § 1.32 (2016), the reclassification process "must follow the same procedures used for original classifications." Noe, Sex Offender Registry Bd. No. 5340 v. Sex Offender Registry Bd., 480 Mass. 195, 199 (2018), citing 803

⁶ We note that although Doe's criminal conduct in 2012 did not constitute a statutorily enumerated "sex offense," the examiner did not err in finding the conduct to be "sexual in nature." Furthermore, the examiner could have determined that Doe's conduct in 2012 constituted "new information" that was reasonably related to Doe's risk of reoffense and degree of dangerousness. See G. L. c. 6, § 178L (3).

⁷ "Where the board determines that the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination, it shall give a level 3 designation to the sex offender." G. L. c. 6, § 178K (2) (c).

Code Mass. Regs. § 1.32(4) (2016). Therefore, as with an original classification, the examiner relies on enumerated factors to assess an offender's degree of dangerousness and risk of recidivism. See Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 109-110 (2014).

In reclassifying Doe in the present case, the examiner relied on the risk-elevating factors of repetitive and compulsive behavior, relationship between the offender and victims, alcohol and substance abuse, contact with the criminal justice system, violence unrelated to sexual assaults, noncompliance with community supervision, public place, diverse sexual behavior, and number of victims. See 803 Code Mass. Regs. § 1.33(2), (7), (9), (10), (11), (13), (16), (20), (22) (2016). The examiner also found that the risk-mitigating factor of advanced age applied, but gave it "significantly reduced weight" because Doe "ha[d] not aged significantly" since his 2013 convictions for sexual misconduct. 803 Code Mass. Regs. § 1.33(30) (2016). Of these nine risk-elevating factors the examiner applied, the factors of repetitive and compulsive behavior, public place, diverse sexual behavior, and number of victims applied to Doe during the reclassification, but not during his initial classification. See 803 Code Mass. Regs. § 1.33(2), (16), (20), (22) (2016).

The crux of Doe's argument is that the four new risk factors relate primarily to Doe's risk of recidivism, but not to his degree of dangerousness, which are separate determinations SORB must make. This is not quite correct. The examiner determined Doe to have a high degree of dangerousness to the public, and we note in particular that two of the newly-applicable factors indicate an increased degree of dangerousness as a matter of law. The examiner here "app[lied] the most aggravating weight" to the repetitive and compulsive behavior factor due to Doe's having "committed crimes of sexual misconduct after being convicted of a sex offense." See 803 Code Mass. Regs. § 1.33(2)(a) (2016). The Legislature has determined that the repetitive and compulsive behavior factor is indicative of a high risk of reoffense and a high degree of dangerousness. See G. L. c. 6, § 178K (1) (a) (ii). With respect to the factor concerning the number of victims, the regulations state that "[o]ffenders who have committed acts of sexual misconduct against two or more victims present an increased risk of reoffense and degree of dangerousness." 803 Code Mass. Regs. § 1.33(22)(a) (2016). See Doe, Sex Offender Registry Bd. No. 68549, 470 Mass. at 109-110, quoting G. L. c. 30A, § 14 (7) ("examiner has discretion . . . to consider which statutory and regulatory factors are applicable and how much weight to ascribe to each factor, and . . . a reviewing

court is required to 'give due weight to [the examiner's] experience, technical competence, and specialized knowledge').

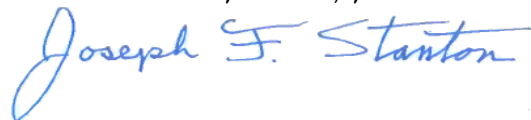
The examiner expressly determined "by clear and convincing evidence . . . that [Doe] now presents as a high risk of re-offense and degree of dangerousness such that active dissemination of his personal information is prudent to public safety," and thus that Doe should be reclassified as a level three sex offender.

Nevertheless, in Doe No. 496501, the court recently concluded that "degree of dangerousness," measured by "the severity and extent of harm that would result if the offender were to commit a new sex offense," and "requir[ing] a hearing examiner to consider what type of sexual crime the offender would likely commit if he or she were to reoffend," 482 Mass. at 651, calls for a "[s]eparate determination[] supported by separate findings [to] improve the rigor and accuracy of final classifications and provide for more effective judicial review." Id. at 656-657. Applying this standard to the particular circumstances of this case, we conclude in our discretion that a remand for further consideration is appropriate. See id. at 657 & n.4. We therefore vacate the Superior Court judgment. A new

judgment shall enter remanding the case to SORB.

So ordered.

By the Court (Neyman, Sacks &
Wendlandt, JJ.⁸),

A handwritten signature in blue ink that reads "Joseph F. Stanton". The signature is written in a cursive, flowing style.

Clerk

Entered: August 14, 2019.

⁸ The panelists are listed in order of seniority.